

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 851

AMY H. VANHORN,

Appellant

MARION H. ALLEN, Collector of Internal Revenue,

Respondent

**PETITION FOR WRIT OF HABEAS CORPUS TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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INDEX **PETITION FOR WRIT OF CERTIORARI**

	<i>Page</i>
Judgment and Opinion Below	1
Statute Involved	2
Regulation Involved	2
Question Presented	2
Reasons Relied on for Writ	2, 3
Statement of Case	3, 4
Certification of Errors	4, 5

TABLE OF CITATIONS

	<i>Page</i>
Revenue Act, Section 22(a)	2
Treasury Regulations	2

INDEX **BRIEF IN SUPPORT OF PETITION FOR CERTIORARI**

	<i>Page</i>
Jurisdiction	6
Revenue Act and Regulation Involved	6, 7
Appendix A (Cases showing States having Pension Statutes)	14
Appendix B (Copies of Georgia Pension Statutes Involved)	15

TABLE OF CITATIONS

	<i>Page</i>
<i>Bogardus v. Commissioner</i> , 302 U.S. 34	8
<i>Dickey v. Jackson</i> , 165 N.W. 387	9
<i>DeWitt v. Richmond County</i> , 16 S.E. (2d) 579	9
<i>Brewster v. Gage</i> , 280 U.S. 327	12
<i>Helvering v. R. J. Reynolds Tobacco Co.</i> , 306 U.S. 110	12
<i>Trotzler v. McElroy, et al., Trustees</i> , 182 Ga. 719	12
<i>Revenue Act</i> , 22(a)	6
<i>Regulation 29.22(a)-2</i>	7
<i>State of Georgia Pension Statutes</i>	15

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1946

NO. _____

AMY H. VARNEDOE,
Appellant

v.

MARION H. ALLEN, COLLECTOR
OF INTERNAL REVENUE,
Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Petitioner respectfully petitions for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Fifth Circuit, and for reason therefor respectfully shows the following:

JUDGMENT AND OPINION BELOW

The judgment sought to be reviewed was entered November 22, 1946, by the Circuit Court of Appeals for the Fifth Circuit in the case of Amy H. Varnedoe v. Marion H. Allen, Collector of Internal Revenue. The opinion of the Circuit Court of Appeals commences on Page 45 of the record and the dissenting opinion on Page 48.

The judgment of the Circuit Court of Appeals affirmed the judgment of the District Court of the United States for the Middle District of Georgia in favor of respondent, Marion H.

Allen, Collector of Internal Revenue (R. 39). The Findings of Fact and Conclusions of Law of the District Court commence on Page 35 of the record. There was no opinion rendered by said court. The judgment of the District Court will be found on Page 39 of the record.

QUESTION PRESENTED

Whether the payment of a pension by the Firemen's Pension Fund of the City of Atlanta to the widow of a deceased fireman of the City of Atlanta constitutes taxable income to such widow, under Section 22(a) of the Internal Revenue Code.

It is petitioner's contention that such payment is not taxable income under the authority of Section 19.22(a)(2) of Regulation 103, and Section 29.22(a)-2 of Regulation 111, the relative portion of which provides:

"However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable."

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Circuit Court of Appeals for the Fifth Circuit has decided an important question of Federal law which heretofore has never been decided or settled, but which should be settled by this court. Other than the decision alleged to be erroneous in this petition, there is no decision of any District Court, Circuit Court of Appeals, Tax Court, or this court deciding that a pension is or is not taxable income within the meaning of the Federal Revenue Law. This is the first decision of any court, Federal or State, upon the taxable status of a pension. The fact that the Bureau of Internal Revenue has never heretofore sought to tax a pension accounts for the absence of litigation on the question.

The question is of great importance because other similar

cases will arise, no doubt in large numbers, inasmuch as there are pension statutes in various large cities, which statutes apply to those engaged in hazardous occupations such as fireman and policeman. Attached to petitioner's brief is Appendix A which sets out a list of cases showing the states where such legislation has been enacted. The case is important for other reasons in that it might conceivably be a precedent with reference to the payment of social security received by a widow or wife of an employee, which widow or wife, although receiving the benefits of social security, had never rendered any services to any employer.

Petitioner alleges that the question is important nationwide particularly on account of the fact that up to 1942 the Bureau of Internal Revenue construed the receipt of such a pension as non-taxable income. It is believed that the reversal of this position will necessarily result in legal contests which will find their way into the various Federal Courts, and it is believed that a decision on the question by this court, settling the question once and for all will eliminate those contests.

STATEMENT OF CASE

There is no dispute as to the facts. The case was tried under an agreed statement of facts (R.31). In substance that stipulation showed that Amy H. Varnedoe was the widow of Lewis Carroll Varnedoe, who during his lifetime was a captain in the Fire Department of the City of Atlanta, Georgia. Lewis Carroll Varnedoe died at the age of 70 on December 20, 1931, while a member of the Fire Department of the City of Atlanta, Georgia, after having rendered 42 years of service with the Fire Department of the City of Atlanta.

That Amy H. Varnedoe, who is 71 years of age, commenced receiving payments from the Trustees of the Firemen's Pension Fund of the City of Atlanta at the rate of \$100 per month, be-

ginning January 1, 1932, immediately following her husband's death, and has continuously received these payments since said date. Said payments were made to her pursuant to an act of the General Assembly of the State of Georgia, approved August 13, 1924, as amended by acts approved August 7, 1925, August 24, 1931, and March 28, 1935. Copies of these acts are set out in Appendix B to petitioner's brief. That Amy H. Varnedoe has never at any time been employed by or rendered services to the City of Atlanta, Georgia, and has never paid or given any consideration whatsoever in exchange for the payments she has received from the Trustees of the Firemen's Pension Fund of the City of Atlanta by and under any of the foregoing acts of the General Assembly of the State of Georgia.

That the salary of Lewis Carroll Varnedoe, received from the City of Atlanta, Georgia, from 1924 to the date of his death, was \$200 per month, and that during said period, deductions were made from his salary as provided for in the above referred to acts of the General Assembly of the State of Georgia.

The respondent, Collector of Internal Revenue, required Amy H. Varnedoe to pay Federal income tax for the years 1941, 1943 and 1944, after which payment a claim for refund was duly filed, and subsequent thereto a suit filed in the District Court to recover said payments. No tax for the year 1942 was involved because under the Current Tax Payment act of 1943 all income taxes for 1942 were extinguished, except that part thereof which was included in the computation of the 1943 tax.

CERTIFICATION OF ERRORS

The Circuit Court of Appeals erred in ruling:

- (1) That payments which petitioner received from the Trustees of the Firemen's Pension Fund of the City of Atlanta were income to her as compensation for services

rendered within the meaning of Section 22(a) of the Internal Revenue Code.

(2) That the language, "However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable," which is a part of Section 29.22(a)-2 of Treasury Regulation 111 interpreting Section 22(a) of the Revenue Code, refers to services rendered to the payor rather than by the payee as contended by petitioner.

(3) That even if such clause should be construed as referring to services rendered to the payor the Circuit Court of Appeals erred because the record in this case shows that the payor was the Board of Trustees of the Firemen's Pension Fund of the City of Atlanta, which is the legal entity created by the legislative acts under which said pension was paid to petitioner.

CONCLUSION

For the reasons stated it is respectfully urged that the writ of certiorari be granted.

Petitioner files simultaneous with the filing of this petition a brief in support thereof.

MRS. AMY H. VARNEDOE

BY WELBORN B. CODY

BERTRAM S. BOLEY

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

JURISDICTION

The jurisdiction of the court is based on Section 240 of the Judicial Code as amended by the act of February 13, 1925 (Title 28 U.S.C.A. Section 347).

REVENUE ACT AND REGULATION INVOLVED

Section 22(a) of the Internal Revenue Code provides as follows:

GENERAL DEFINITION.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly. In the case of judges of courts of the United States who took office on or before June 6, 1932, the compensation received as such shall be included in gross income.

The only portion of the aforecited Section of the Internal Revenue Code under which the payments received by appellant

could under any conceivable theory be included in gross income is that portion which provides:

"Gross income includes * * * income derived from * * * compensation for personal service * * *".

It was under this portion of Section 22(a) that counsel for the respondent contended, and the trial judge held, that the payments received by petitioner were taxable.

Section 29.22(a)-2 of Treasury Regulation 111 in part is as follows:

Compensation for Personal Services.—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by the United States (unless expressly exempt) or by private persons are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. *However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable. (Italic ours).*

This ruling also appears in Section 19.22(a)-(2) of Regulation 103.

The only portion of the aforesaid regulation applicable to this case is that which reads as follows:

"However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable."

Unquestionably the money with which we are now dealing was paid as a pension. The language used by the legislature of the State of Georgia in the statutes here involved discloses an

obvious intention to pay a "pension" as distinguished from an intention to classify the payment as "compensation." A copy of the legislative acts under consideration is attached to this brief as appendix B. The court's attention is called to the caption of the acts which denominates the payments as "pensions." Section 1 of the act of 1924 provides " there shall be raised and established funds for the aid, relief and pension of employees of paid fire departments . . . ". Other sections of the act and amendments thereto refer to "pensions" being paid to members of fire departments in certain cities where they are killed or disabled in line of duty, and further provides for the payment of such pension to the widows of such firemen under certain conditions.

This court in the case of *Bogardus v. Commissioner*, 302 U. S. Page 34, stated that in the consideration of questions such as the one here involved, the intention with which the payment was made is the controlling factor. This court stated that a gift is none the less a gift because inspired by gratitude for the past faithful service of the recipient.

It seems to us that the legislative intent could have been nothing other than to create what in strict terms would be called a "pension" statute. An analysis of the various cases dealing with pension laws for firemen and policemen in large municipalities indicates the philosophy back of these so-called pension statutes. There is involved a group of workmen who do not have the advantages of the state workmen's compensation law. They are not subject to the social security laws. They are engaged in a hazardous occupation and one which will not permit them to obtain life and accident insurance at the rates normally paid by the average working class. Added to this, it can be found as an historical fact that employees in this class are not well paid. The record in this case shows that the deceased husband of the petitioner was employed by the City of

Atlanta as a fireman for a period of 42 years during which time he was never paid in excess of \$200 per month. When these facts are considered in the light of the legislative acts under consideration, we say in all confidence that the only intention which the legislature of Georgia had in mind when these statutes were passed was to create a pension in its strictest sense. A pension can be given to an employee in recognition of his long and faithful service, but not from a strict legal sense in consideration thereof. See *Dickey v. Jackson*, 181 Iowa 1155, 1160, (165 N.W. 387). The Supreme Court of Georgia in *DeWitt v. Richmond County*, 192 Ga. 770, (16 S.E. 2d 579), held to this exact effect. The DeWitt case was referred to by Circuit Judge Waller who rendered a dissenting opinion in the decision now complained of.

The court below in the majority opinion seems to have based its decision on a most peculiar interpretation of the last sentence of Section 29.22(a)-2 of Treasury Regulation 111, which sentence reads as follows:

“However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable.”

The majority opinion points out that what was referred to by this sentence was services rendered by anyone, not necessarily the one receiving the so-called pension. It is inconceivable to us how such an interpretation could be correctly drawn from such language. It seems to us clearly that the meaning of such language is that where a pension is received by one who has rendered no services it is not taxable income. The record in this case shows that petitioner was the widow of a deceased fireman and that she never rendered any services to anyone. The payment to her, therefore, was purely a result of her being the widow of a person who devoted his entire business life to one employer constantly and faithfully, and at a rate of compen-

sation which did not permit him to provide for himself or for her during their aging years. The majority opinion in the court below contains certain language used in the brief of opposing counsel in the court below. It seems to have been an afterthought by such counsel for the Bureau of Internal Revenue because we here quote its interpretation of this particular sentence of Treasury Regulation 111 (of the section heretofore referred to), which interpretation was followed for many years. That interpretation will be found on Pages 34 and 35 of the record, which is a letter from respondent interpreting this very pension statute. It is as follows:

"Reference is made to your conversation with Mr. McClatchey relative to the taxable status for Federal income tax purposes of the income which you received from the Pension Fund of the City of Atlanta.

"The facts seem to disclose that you derive this income from the Pension Fund as the widow of Mr. Cody, former Chief of the Atlanta Fire Department, and that the income is not derived because of any personal service that you have performed as an employee of the City.

"Section 19.22(a)-2 of the Internal Revenue Code reads in part: 'However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are non-taxable.'

"In view of this provision of the Code, it is my opinion that the income you derived from the Pension Fund of the City of Atlanta is exempt from Federal income tax and does not therefore have to be reported by you on a Federal income tax return.

"Trusting that the desired information has been furnished, I am

Yours very truly,

(Sgd.) MARION H. ALLEN,
Collector."

Another error made by the court below in the interpretation of the statutes here involved will be found in the majority opinion wherein it is assumed that the City of Atlanta made these payments direct to the pensioner. This is not correct, and a reference to the pension statutes here involved will clearly show that the statutes created what was known as a Board of Trustees whose duty it was to manage the fund and pay the pensions. (See Statutes which are an appendix to this brief) Section 6 of the legislative act of 1924 is as follows:

"Be it further enacted that there is hereby established, to serve without pay, a board of trustees whose duties it shall be to manage said funds which shall be kept by the City Treasurer of such cities as a separate fund and covered by his bond as such. The board of trustees shall consist of the city treasurer, the city comptroller, the chief of the fire department and two members of the fire department to be elected by the members of said department in active service on the first Monday in September every year after the passage of this Act. These two members of the department to serve one year and until their successors are elected. The city comptroller, city treasurer and chief of the fire department to be permanent members of the board."

A reference to Sections 9 and 10 of the act of 1924 will indicate where the money comes from with which said pensions are paid, no part of which is actually paid by the City of Atlanta. The pension fund is derived from a tax of one per cent (1%) (Later changed to 2%) on the salaries of the firemen and from an additional tax on the collection of fire insurance premiums in the particular city involved. It was not until 1931 that the legislative act was amended to provide that if any deficit occurred in this fund the city would be required to pay such deficit to the fund (and not direct to a pensioner). It therefore clearly appears that the money paid to petitioner which is the subject matter of this litigation was paid by the Board of

Trustees of the Firemen's Pension Fund of the City of Atlanta, and not by the City of Atlanta itself, although a part of said fund may have been contributed by the city. The court below therefore in its majority opinion did not properly apply the last sentence of Section 29.22(a)-2 of Regulation 111 when it stated that the payor was the one to whom the services must be rendered, and that it was immaterial who rendered the services. The payor in this case was the Board of Trustees of the Firemen's Pension Fund of the City of Atlanta, and no service was ever rendered to that Board by the deceased husband of petitioner, and under these circumstances the decision of the court below is erroneous.

This court in *Brewster v. Gage*, 50 S.C. 115, (280 U.S. 327), stated that it was more practical to follow the interpretation placed upon a statute or regulation by whatever administrative officer was charged with the enforcement of the same, and that such an interpretation by the officials in charge ought not be disturbed except for very weighty reasons.

For many years the Bureau of Internal Revenue interpreted the revenue law to mean that a pension such as the one now under consideration was not taxable income when received by one who rendered no services. There is no weighty reason to disturb this interpretation nor has the Respondent in this case shown any such reason to exist. No suggestion is made that one exists. Apparently Congress has been satisfied for many years with the interpretation placed upon such section in that it has repeatedly reenacted the tax act in the light of the construction placed upon it by the administrative department. (See *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110).

In conclusion we wish to state that counsel for the Respondent stated in the court below that one of the reasons why payment of this pension should be declared taxable income was that the Supreme Court of Georgia in the case of *Trotzler v. McElroy*,

et al, Trustees, 182 Ga. 719, held that after the right to receive said pension accrued the pensioner had a vested right, which was in the nature of a contract created by statute. Opposing counsel argued that if it arose by reason of a contract it could not be considered a pension. Our answer to this is that under the federal social security law a widow is entitled to certain payments after the death of her husband, even though she has never rendered any services to anyone. This payment is a vested right and is payable to her as a result of her husband's salary being taxed and her husband's employer being taxed for that purpose. It is a contract created by statute in which she has a vested right. The Bureau of Internal Revenue has never up to this time taken the position that such a payment would be taxable income. Possibly it will do so now but such we feel sure was never the intent of Congress. Another illustration which is not entirely similar, but may be of some importance is that of where a corporation after the death of an employee pays to the widow of such employee the salary which the employee would have earned during the remaining portion of the year. This is a very common practice among large and successful corporations. The Bureau of Internal Revenue has never considered such payment to the widow as taxable income to her. See O.D. 1017 (5 CB 101). This is true even though the corporation is given the benefit of a deductible expense with reference to such payment. See Regulation 29.23(a)-9.

Respectfully submitted,

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APPENDIX "A"

PARTIAL LIST OF CASES SHOWING STATES HAVING PENSION STATUTES FOR BENEFIT OF FIREMEN AND POLICEMEN.

- Sheehan vs. Commissioner, 190 Pac 51, California.
- Byrd vs. City of Dallas, 6SW(2) 738, Texas.
- State vs. Love, 131 N.W. 196, Nebraska.
- Cobbs vs. Home Insurance Co., 91 So 627, Alabama.
- Bowler vs. Nagel, Controller, 200 N.W. 258, Michigan.
- Lage vs. City of Marshalltown, 235 N.W. 761, Iowa.
- City of Philadelphia Pension Fund vs. Walton, 38 Atl. 790,
Pennsylvania.
- Risch vs. Bd. of Trustees of Policemen's Pension Fund,
98 N.W. 954, Wisconsin.
- Board of Trustees of Firemen's Pension Fund vs. McCrory,
116 S.W. 326, Kentucky.
- Beutel vs. Foreman et al, 23 N.E. 270, Illinois.
- Gibbs vs. Minneapolis Fire Department Relief Assn.,
145 N.W. 1075, Minnesota.
- Plunkett vs. Board of Pension Commissioners, 173 Atl. 923,
New Jersey.
- State ex rel. vs. Jones et al, 174 N.E. 783, Ohio.
- State ex rel. vs. City of Tampa, 159 So 292, Florida.
- State ex rel. vs. Board of Trustees of Firemen's Pension
Fund, 184 S.W. 929, Missouri.
- Roddy vs. Valentine Police Commissioner, 197 N.E. 260,
New York.

**APPENDIX "B" TO BRIEF
COPIES OF LEGISLATIVE ACTS.**

An Act of the General Assembly of the State of Georgia,
approved August 13, 1924, (Ga. Laws 1924, pages 167-173):

**PENSIONS FOR FIREMEN IN CERTAIN CITIES;
PAYMENTS IN CASE OF ACCIDENT, DEATH, ETC.**

No. 454.

An Act to provide that cities having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920 or any subsequent census shall furnish aid, relief and pensions to members of paid fire departments now in active service, and whose names are on the pay roll of such department and to future members, and their dependents in specified cases. To provide how such members who have served twenty-five years may be retired for life on half pay. *To provide how such members shall be paid in case of total disability resulting from such service, and how such total disability may be determined.* To provide for relief in case of sickness or accident resulting from such service. To provide for the relief of dependents and to provide for widows and children of deceased pensioners to be paid in case of death of any such member resulting from said service. To provide that such cities shall levy tax of one (1%) per centum on the salaries of such members in active service and on pay roll and to future members to raise in part the funds to pay such aids, reliefs and pensions, collectible monthly. To provide that such cities shall use one-fifth (1-5) of the tax collected on fire and lightning insurance companies or associations from the premiums thereof on property situated within the corporate limits of such cities; to pay such aid, relief and pensions. To provide that such cities shall levy a tax of one and one-fourth ($1\frac{1}{4}$) per centum on the premiums of such fire and lightning insurance companies on property situated within the corporate limits of such cities. To provide that one and one-fourth ($1\frac{1}{4}$) per centum

shall be the limit which such cities shall be allowed to tax the premiums of such fire and lightning insurance companies or associations on premiums collected on property situated in the corporate limits of such cities. To provide how such funds shall be collected, deposited and managed for the members of such fire departments now in active service and whose names are on the pay roll of such departments and for future members. To create a board of trustees and provide for their selection and election, to manage, deposit, disburse upon order and invest said funds which shall be raised by the one (1) per centum tax on the salaries of members now in active service and future members, and one-fifth (1-5) of the premium tax on fire and lightning insurance taxes. To provide that this Act shall not repeal nor in any wise affect any benefit or pension now being paid to those who were receiving the same prior to the passage of this Act; and that this Act shall not apply to those receiving pensions or benefits prior to the passage of this Act. To provide that such board of trustees shall make all necessary rules for carrying out the terms of this Act. To provide that in case there shall at any time be on hand less funds than are needed, the actual funds shall be prorated among the beneficiaries. To provide that none of the funds mentioned shall be subject to attachment, garnishment, judgment; nor shall they be assignable; but shall be paid in cash to the beneficiary if so requested by him or her. To provide that if any part of this Act shall be held unconstitutional, the remainder of this Act shall remain in force taken in connection with existing laws. To provide that this Act shall not affect nor be affected by any workmen's compensation act or other similar laws. To repeal conflicting laws, and for other purposes.

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this Act there shall be raised and established funds for the aid, relief and pension of members of paid fire departments who are in active service at the time of the passage of this Act and whose names are

on the pay roll of such departments and future members of such departments, and their dependents in all cities in Georgia having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920 or any subsequent census of the United States.

Sec. 2. Be it further enacted that any member of such fire department who is in active service at the time of the passage of this Act and whose name is on the payroll, and future members, *may as a matter of right, retire from active service*, provided he shall have served twenty-five (25) years in active service at the time of his retirement.

Sec. 3. Be it further enacted that any member of such department who is in active service at the time of the passage of this Act and whose name is on the pay roll and future members who shall be injured or whose health shall become permanently impaired to such an extent as to render him totally disabled as a result of such service shall upon application be retired. Should the board of trustees refuse to grant an order of retirement, the applicant shall select a physician, the board shall select a physician, and the two physicians so selected shall select a third. These three shall examine the applicant and determine whether he is totally disabled and the decision of a majority of these physicians shall be final on the question.

Sec. 4. When such member shall retire as a matter of right he shall be paid one-half of the salary he was receiving at the time of his retirement, for the rest of his life, to be paid monthly. In case of death of a pensioner his widow and children shall draw his pension as herein provided in case of death of member of such department.

Sec. 5. When such member shall be retired for total disability he shall be paid one-half of the salary he was receiving at the time of his retirement for the rest of his life, to be

paid monthly, but this Act shall not affect the salary of a member in active service, except the tax of one (1) per cent thereon.

Sec. 6. Be it further enacted that there is hereby established, to serve without pay, a board of trustees whose duties it shall be to manage said funds which shall be kept by the City Treasurer of such cities as a separate fund and covered by his bond as such. The board of trustees shall consist of the city treasurer, the city comptroller, the chief of the fire department and two members of the fire department to be elected by the members of said department in active service on the first Monday in September every year after the passage of this Act. These two members of the department to serve one year and until their successors are elected. The city comptroller, city treasurer and chief of the fire department to be permanent members of the board.

Sec. 7. This board shall make all rules for the payment of said funds to those entitled to receive the same. It shall have its first meeting on Wednesday following the first Tuesday in September after the passage of this Act and organize by electing a chairman, a vice-chairman who shall serve when the chairman is absent, and a secretary. The chairman shall sign all vouchers for the disbursements of the fund and his written order shall fully protect the city treasurer in the payment of the same. A majority of the board shall control on all questions.

Sec. 8. The board shall make its own rules as to times and places of meetings.

Sec. 9. A tax of one (1) per centum shall be levied on the salaries of all members in active service at the time of the passage of this Act monthly; and the city treasurer shall retain that amount from their salaries.

Sec. 10. A tax of one and one-fourth ($1\frac{1}{4}$) per centum shall be levied against the premiums of all fire and lightning insurance companies or associations on property situated within the corporate limits of such cities, and returns by said companies or associations made and tax collected as now provided by ordinance in such cities, to be collected from and after passage of this Act. One-fifth (1-5) of the tax provided in this section shall go to aid, relief, and pension funds provided in this Act.

Sec. 11. The city treasurer shall keep separate and apart from other monies in his possession the funds raised in Sections 9 and 10 hereof for the sole uses mentioned in this Act, and subject to the orders of said board of trustees.

Sec. 12. The said city tax on insurance premiums on property situated in the corporate limits of such cities shall be and is hereby limited to one and one-fourth ($1\frac{1}{4}$) per centum.

Sec. 13. The board of trustees shall formulate rules for taking care of members in active service at the time of the passage of this Act while temporarily sick or hurt, and paying the expense thereof. The board of trustees shall formulate rules for paying the pension of a member of the department who loses his life in the service to his widow till she dies or remarries; and for paying to widow and children pension of deceased pensioner; and for paying the pension of such deceased fireman to his orphan children till they reach the age of sixteen; provided the total payments to widow and orphan or orphans shall not exceed one-half the pay of such deceased fireman. The trustees shall keep a strict account of the disbursements and receipts of all funds which shall be open at all times to public inspection.

Sec. 14. In case a member has served twenty-five years does not desire to retire, and the board of trustees deem such

member incapable of further service in the department; the same proceeding shall be had as that to determine the condition of a disabled fireman as set forth in Section three (3) hereof. The decision shall be final.

Sec. 15. The city attorney shall without extra compensation render such legal service as such board of trustees shall require.

Sec. 16. In case there should accumulate more funds than should be needed for immediate use, the board of trustees are empowered to invest such excess funds in United States, Georgia, or municipal bonds; but not otherwise.

Sec. 17. Be it further enacted that none of the funds herein mentioned shall be subject to attachment, garnishment, judgment; nor shall they be assignable; but shall be paid in cash to the beneficiary if so requested by him or her.

Sec. 18. Be it further enacted that if any part of this Act shall be held unconstitutional, the remainder of this Act shall be of full force and effect provided the general terms of this Act can still be carried out.

Sec. 19. Be it further enacted that this Act shall not repeal nor in any wise affect any benefit or pension now being paid to those who were receiving the same prior to the passage of this Act.

Sec. 20. Be it further enacted that the plan and purpose of this Act is to furnish aid, relief and pension to aged and disabled firemen who are now or may be in the future in the active service of such departments and on the pay roll of such departments and to their dependents. That the taxation herein provided is a part of the general purpose of this Act to accomplish this end.

Sec. 21. Provided this Act shall not affect or be affected by any workman's compensation law, or other similar laws.

Sec. 22. Be it further enacted that all laws and parts of laws in conflict herewith, be and the same are hereby repealed.

Approved August 13, 1924.

An Act of the General Assembly of the State of Georgia, approved August 7, 1925, (Ga. Laws 1925, pages 194-198):

**FIREMEN'S PENSIONS IN CERTAIN CITIES;
ACT OF 1924 AMENDED.**

No. 159.

A Bill to be entitled an Act to amend an Act passed August 13, 1924, entitled an Act to provide that cities having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920, or any subsequent census to provide that such cities shall use one-fifth (1-5) of the tax collected on fire and lightning insurance companies or associations from the premiums thereof on property situated within the corporate limits of such cities, to pay such aid, relief pensions, to provide that such cities shall levy a tax of one and one-fourth ($1\frac{1}{4}$) per centum on the premiums of such fire and lightning insurance companies on property situated within the corporate limits of such cities. To provide that one and one-fourth ($1\frac{1}{4}$) per centum shall be the limit which such cities shall be allowed to tax the premiums of such fire and lightning insurance companies or associations on premiums collected on property situated in the corporate limits of such cities. To provide how such funds shall be collected, deposited and managed for the members of such departments now in active service and whose names are on the pay roll of such departments and for future members. To create a board of trustees and provide for their selection and election to manage, deposit, disburse upon order and invest said funds which shall be raised by one (1) per centum tax on the salaries of members now in active service and future members, and one-fifth (1-5) of the premium tax on fire and lightning insurance taxes.

To provide that this Act shall not repeal nor in any wise affect any benefit or pension now being paid to those who were receiving the same prior to the passage of this Act; and that this Act shall not apply to those receiving pensions or benefits prior to the passage of this Act. To provide that such board of trustees shall make all necessary rules for carrying out the terms of this Act. To provide that in case there shall at any time be on hand less funds than are needed, the actual fund shall be prorated among the beneficiaries. To provide that none of the fund mentioned shall be subject to attachment, garnishment, judgment; nor shall they be assignable, but shall be paid in cash to the beneficiary if so requested by him or her. To provide that if any part of this Act shall be held unconstitutional, the remainder of this Act shall remain in force taken in connection with existing laws. To provide that this Act shall not affect nor be affected by any workman's compensation act or other similar laws. To repeal conflicting laws and for other purposes, by striking from said title the words "to provide that such cities shall use one-fifth (1-5) the tax collected on fire and lightning insurance companies or associations from the premiums thereof on property situated within the corporate limits of such cities, and by striking therefrom the words "one-fifth (1-5) of the premium taxes on fire and lightning insurance companies and inserting in lieu of the words one-fifth (1-5) the words two-fifths (2-5) so that the title to said bill as amended shall read as follows:

An Act to provide that cities having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920 or any subsequent census shall furnish aid, relief and pensions to members of paid fire departments now in active service, and whose names are on the pay roll of such department and to future members, and their dependents in specified cases. To provide how such members who have served twenty-five years may be retired for life on half pay. To provide how such members shall be paid in case of total disability resulting from such service, and how such total disability may be de-

terminated. To provide for relief in case of sickness or accident resulting from such service. To provide for the relief of dependents and to provide for widows and children of deceased pensioners to be paid in case of death of any such member resulting from said service. To provide that such cities shall levy tax of one (1%) per centum on the salaries of such members in active service and on pay roll and to future members to raise in part the funds to pay such aids, reliefs and pensions, collectible monthly. To provide that such cities shall use two-fifths (2-5) of the tax collected on fire and lightning insurance companies or associations from the premiums thereof on property situated within the corporate limits of such cities; to pay such aid relief and pensions. To provide that such cities shall levy a tax of one and one-fourth ($1\frac{1}{4}$) per centum on the premiums of such fire and lightning insurance companies on property situated within the corporate limits of such cities. To provide that one and one-fourth ($1\frac{1}{4}$) per centum shall be the limit which such cities shall be allowed to tax premium of such fire and lightning insurance companies or associations on premiums collected on property situated in the corporate limits of such cities. To provide how such funds shall be collected, deposited and managed for the members of such fire departments now in active service and whose names are on the pay roll of such departments and for future members. To create a board of trustees and provide for their selection and election, to manage, deposit, disburse upon order and invest said funds which shall be raised by the one (1) per centum tax on the salaries of members now in active service and for future members, and two-fifths (2-5) of the premium tax on fire and lightning insurance taxes. To provide that this Act shall not repeal nor in any wise affect any benefit or pension now being paid to those who were receiving the same prior to the passage of this Act; and that this Act shall not apply to those receiving pensions or benefits prior to the passage of this Act. To provide that such board of trustees shall make all necessary rules for carrying out the terms of this Act. To provide that in case there shall

at any time be on hand less funds than are needed, the actual funds shall be prorated among the beneficiaries. To provide that when a fireman has served twenty-five years and has not taken a pension; but is still in active service at the time of his death; his widow shall receive the pension he might have taken; during her widowhood. To provide that none of the funds mentioned shall be subject to attachment, garnishment, judgment; nor shall they be assignable; but shall be paid in cash to the beneficiary if so requested by him or her. To provide that if any part of this Act shall be held unconstitutional, the remainder of this Act shall remain in force taken in connection with existing laws. To provide that this Act shall not affect nor be affected by any workmen's compensation act or other similar laws. To repeal conflicting laws, and for other purposes.

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this Act, that Section 10 of the Act approved August 13, 1924, Acts 1924, page 171, is hereby repealed and Section 10 of said Act shall read as follows, to-wit:

Sec. 10. A tax of one and one-fourth ($1\frac{1}{4}$) per centum shall be levied against the premiums of all fire and lightning insurance companies or associations on property situated within the corporate limits of such cities, and returns by said companies or associations made and tax collected as now provided by ordinance in such cities, to be collected from and after the passage of this Act. Two-fifths ($2\frac{1}{5}$) of the tax provided in this section shall go to aid, relief, and pension funds provided in this Act.

Sec. 2. Be it further enacted, that there be added to said Act a section to be known as Section 14 (a) as follows: Be it further enacted that when any fireman who has served twenty-five years and is in active service at the time of his death dies,

his widow shall receive the pension he might have taken; during her widowhood.

Sec. 3. Be it enacted that all laws and parts of laws in conflict herewith be and the same are hereby repealed.

Approved August 7, 1925.

An act of the General Assembly of the State of Georgia, approved August 24, 1931, (Ga. Laws 1931, pages 223-228):

**PENSIONS AND RELIEF TO FIREMEN IN
CERTAIN CITIES.**

No. 137.

An Act to amend an Act approved August 13, 1924, published in Acts of 1924 on pages 167 to 173, inclusive, entitled: An Act to provide that cities having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920 or any subsequent census shall furnish aid, relief, and pensions to members of paid fire departments now in active service, and whose names are on the pay roll of such department and to future members, and their dependents in specified cases. To provide how such members who have served twenty-five years may be retired for life on half pay. To provide how such members shall be paid in case of total disability resulting from such service, and how such total disability may be determined. To provide for relief in case of sickness or accident resulting from such service. To provide for the relief of dependents and to provide for widows and children of deceased pensioners to be paid in case of death of any such member resulting from said service. To provide that such cities shall levy tax of one (1%) per centum on the salaries of such members in active service and on pay roll and to future members to raise in part the funds to pay such aids, reliefs and pensions, collectible monthly. To provide that such cities shall use one-fifth (1-5) of the tax collected on fire and lightning insurance companies or

associations from the premiums thereof on property situated within the corporate limits of such cities; to pay such aid, relief, and pensions. To provide that such cities shall levy a tax of one and one-fourth ($1\frac{1}{4}$) per centum on the premiums of such fire and lightning insurance companies on property situated within the corporate limits of such cities. To provide that one and one-fourth ($1\frac{1}{4}$) per centum shall be the limit which such cities shall be allowed to tax the premiums of such fire and lightning insurance companies or associations on premiums collected on property situated in the corporate limits of such cities. To provide how such funds shall be collected, deposited, and managed for the members of such fire departments now in active service and whose names are on the pay roll of such departments and for future members. To create a board of trustees and provide for their selection and election, to manage, deposit, disburse upon order and invest said funds which shall be raised by one (1) per centum tax on the salaries of members now in active service and future members, and one-fifth (1-5) of the premium tax on fire and lightning insurance taxes. To provide that this Act shall not repeal nor in any wise affect any benefit or pension now being paid by those who were receiving the same prior to the passage of this Act; and that this Act shall not apply to those receiving pensions or benefits prior to the passage of this Act. To provide that such board of trustees shall make all necessary rules for carrying out the terms of this Act. To provide that in case there shall at any time be on hand less funds than are needed, the actual funds shall be prorated among the beneficiaries. To provide that none of the funds mentioned shall be subject to attachment, garnishment, judgment; nor shall they be assignable; but shall be paid in cash to the beneficiary if so requested by him or her. To provide that if any part of this Act shall be held unconstitutional, the remainder of this Act shall remain in force taken in connection with existing laws. To provide that this Act shall not affect nor be affected by any workmen's compensation Act or other similar laws. To repeal conflicting laws; and for

other purposes, so as to provide for amount of pensions payable to present and future pensioners thereunder or to their widows, minor children, or widowed mothers in the event of the death, retirement, or disability of pensioners; so as to provide for the payment in certain instances to pensioners' estates or beneficiaries of all premiums paid by pensioners; so as to provide for additional funds for said pensions and for any deficiency in said pension fund; so as to provide for the change in term of two trustees of said fund and for election of said two trustees; so as to provide amount of pensions to be paid those now receiving pensions; and for other purposes.

Sec. 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same that from and after the passage of this Act, a certain Act approved August 13, 1924, published in the Acts of 1924, pages 167 to 173 inclusive, entitled "An Act to provide that cities having a population of more than one hundred fifty thousand (150,000) by the United States Census of 1920 or any subsequent census, shall furnish aid, relief and pensions to members of paid fire departments now in active service, etc.; and for other purposes," and Acts amendatory thereof, be and the same is hereby amended by striking section 4 of said Act and inserting in lieu thereof a new section 4 which shall read as follows: Section 4. When such member shall retire as a matter of right, he shall be paid thereafter one-half of the salary he was receiving at the time of his retirement for the rest of his life, unless said one-half salary should be less than \$100.00 per month, in which event the sum of \$100.00 per month shall be paid for the rest of his life, to be paid monthly, provided he shall have served the 25 years in active service at the time of his retirement, or shall have become totally disabled in the line of duty at any time as aforesaid. In case of death of a pensioner, his widow, if any, shall receive during her life and until remarried, the *amount of pension being paid to said pensioner at the time of*

his death. If pensioner leaves no widow, but leaves orphan children under the age of 16 years, such orphan child or children shall receive until reaching the age of 16 years *the pension being paid to said pensioner at the time of his death.* Upon the death of any pensioner under this Act, from any cause; who has no dependent entitled to his pension, the money he has paid into the pension fund shall be paid to his beneficiaries or to his estate at his death. Upon the death of an unmarried pensioner who is supporting a widowed mother, the amount of pension being paid to him at the time of his death shall thereafter be paid to his said mother during the period of her life or until she marries.

Sec. 2. Be it further enacted, that section 5 of the aforesaid Act approved August 13, 1924, be and the same is hereby stricken and a new section 5 inserted in lieu thereof, which shall read as follows, to-wit: Section 5. When such member shall be retired for total disability, he shall be paid one-half of the salary he was receiving at the time of his retirement (or the sum of \$100.00 per month if said one-half of his salary does not equal or exceed that sum) for the rest of his life, to be paid monthly; but this Act shall not affect the salary of a member in active service, except the tax of one (1%) per cent. thereon.

Sec. 3. The aforesaid Act approved August 13, 1924, is further amended by inserting after section 5 of said Act a new section to be known as Section 5-a, said section to read as follows: Section 5-a. Should any member become totally disabled (not from self-abuse) so as to make such member unfit for fire duty or services, he shall receive a pension graduated according to the length of his service before such disability as follows:

Five (5) years service.....	\$ 20.00 per month.
Ten (10) years service.....	40.00 per month.

Fifteen (15) years service.....	60.00 per month.
Twenty (20) years service.....	80.00 per month.
Twenty-five (25) years service..	100.00 per month.

Upon the death of such member while receiving this pension, his widow, if any, shall continue to draw the same during her life or until she remarries; and if no widow, his minor child or children shall draw the same until reaching the age of 16.

Sec. 4. Said Act approved August 13, 1924, is further amended by adding thereto after section 6 a new section to be known as section 6-a, which shall read as follows: Section 6-a. The two trustees who are members of the fire department and who are elected the first Monday in September 1931 shall be elected for a term of four (4) years and two (2) years respectively, the trustee receiving the highest number of votes to serve for four years and the one receiving the next highest number of votes to serve for two years, and their successors thenceforth to serve for terms of four years.

Sec. 5. Said section 10 of said Act approved August 13, 1924 is hereby amended by striking the same in its entirety and inserting in lieu thereof a new section 10 which shall read as follows: Section 10. A tax of one and one-fourth ($1\frac{1}{4}$) per centum shall be levied against the premiums of all fire and lightning insurance companies or associations on property situated within the corporate limits of such cities, and returns by said companies or associations made and tax collected as now provided by ordinance in such cities, to be collected from and after the passage of this Act. The tax provided in this section shall go to aid, relief, and pension funds provided in this Act.

Sec. 6. Said Act approved August 13, 1924, is further amended by striking therefrom section 16 thereof and inserting in lieu thereof a new section thereby known as section 16, which

shall read as follows: Section 16. In case there should accumulate more funds than should be needed for immediate use, the board of trustees are empowered to invest such excess funds in United States, Georgia, or municipal bonds; but not otherwise. Should there be on hand insufficient funds to carry out the purposes of this Act, such additional funds as are necessary therefor shall be paid out of the treasury of the city.

Sec. 7. Be it further enacted, that all persons now receiving pensions under the provisions of said Act approved August 13, 1924, shall henceforth receive such pensions in the amounts provided for in this Act.

Sec. 8. Be it further enacted, that all laws and parts of laws in conflict herewith be and the same are hereby repealed.

Approved August 24, 1931.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statutes and regulations involved.....	2
Statement.....	2
Argument.....	4
Conclusion.....	8
Appendix.....	9

CITATIONS

Cases:

<i>Bogardus v. Commissioner</i> , 302 U. S. 34.....	8
<i>DeWitt v. Richmond County</i> , 192 Ga. 770.....	6
<i>Flaraheim v. United States</i> , 156 F. 2d 105.....	7
<i>Hollis v. Jones</i> , 184 Ga. 273.....	6
<i>Miller v. Commissioner</i> , 144 F. 2d 287.....	5
<i>Sutro v. United States</i> , decided June 16, 1942.....	7
<i>Trotzler v. McElroy</i> , 182 Ga. 719.....	6
<i>West v. Anderson</i> , 187 Ga. 587.....	6

Statutes and Georgia Constitution:

Internal Revenue Code, Sec. 22 (26 U. S. C. 22).....	4, 16
Constitution of the State of Georgia, Art. 7, Sec. 16.....	8
Georgia Laws (1924), pp. 167-173, Act No. 454, approved August 13, 1924.....	5, 9
Sec. 1.....	11
Sec. 2.....	6, 12
Sec. 3.....	12
Sec. 4.....	6, 12
Sec. 5.....	12
Sec. 6.....	7, 13
Sec. 7.....	7, 13
Sec. 8.....	13
Sec. 9.....	13
Sec. 10.....	14
Sec. 11.....	14
Sec. 12.....	14
Sec. 13.....	7, 14
Sec. 14.....	15
Sec. 15.....	15
Sec. 16.....	15
Sec. 17.....	15
Sec. 18.....	15
Sec. 19.....	15
Sec. 20.....	15
Sec. 21.....	16
Sec. 22.....	16

II

Statutes and Georgia Constitution—Continued		Page
Georgia Laws (1925), pp. 194-198, Act. No. 159, approved August 7, 1925, Sec. 2.....		6, 16
Miscellaneous:		
I. T. 3329, 1939-2 Cum. Bull. 153.....		4
I. T. 3362, 1940-1 Cum. Bull. 18.....		4
I. T. 3653, 1944 Cum. Bull. 75.....		4
L. O. 1040, 3 Cum. Bull. 120 (1920).....		5
T. D. 3112, 4 Cum. Bull. 76 (1921).....		5
Treasury Regulations 45, Art. 32.....		4
Treasury Regulations 103, Sec. 19.22 (a)-2.....		19
Treasury Regulations 111, Sec. 29.22 (a)-2.....		4, 17

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 851

AMY H. VARNEDOE, PETITIONER

v.

**MARION H. ALLEN, COLLECTOR OF INTERNAL
REVENUE**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

There is no opinion of the District Court. The District Judge, on June 4, 1946, filed his findings of fact and conclusions of law. (R. 35-39.) The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 44-50) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 22, 1946. (R. 50.) Petition for a writ of certiorari was filed on January 4, 1947. Jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether monthly payments received by the taxpayer, the widow of an officer of the Atlanta Fire Department, by virtue of an Act of the General Assembly of the State of Georgia, constitute taxable income to her under Section 22 (a) of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*, pp. 9-19.

STATEMENT

This case was heard before the District Court on a stipulation of facts (R. 31-33), which may be summarized as follows:

The taxpayer is the widow of Lewis Carroll Varnedoe, who, during his lifetime, was a captain in the Fire Department of the city of Atlanta, Georgia. Captain Varnedoe died on December 20, 1931, at the age of 70, after having served approximately 42 years with the Fire Department of the city of Atlanta. At the time of his death he was employed by the Fire Department of Atlanta. (R. 31, 36.)

Captain Varnedoe's widow, the taxpayer, commenced receiving payments of \$100 per month, from the city of Atlanta, Georgia, beginning January 1, 1932, and continuously received payments

in this amount up to the date of the trial of this case. These payments were received by the taxpayer pursuant to an act of the General Assembly of the State of Georgia, approved August 13, 1924 (Ga. Laws 1924, pp. 167-173), as amended by acts approved August 7, 1925 (Ga. Laws 1925, pp. 194-198), August 24, 1931 (Ga. Laws 1931, pp. 223-228), and March 28, 1935 (Ga. Laws 1935, pp. 450-456). (R. 32, 36.)

The taxpayer has never, at any time, been employed by or rendered services to the city of Atlanta, and has never, at any time, paid or given any personal consideration whatsoever in exchange for the payments she has received from the city of Atlanta pursuant to the foregoing acts of the General Assembly of the State of Georgia. (R. 32, 37.)

The salary which Captain Varnedoe received from the city at Atlanta from 1924 to the date of his death amounted to \$200 per month, and during that period, deductions were made from his salary as provided by the above cited acts of the State of Georgia. (R. 32, 37.)

On November 27, 1944, the taxpayer paid to the Collector of Internal Revenue income tax for the year 1941 in the amount of \$83.01 plus \$13.28 in interest, and the amount of \$259.74 plus \$9.36 in interest, for the year 1943. On January 2, 1945, she paid a tax of \$261.51 for the year 1944. (R. 32-33, 37.)

The taxpayer duly and timely filed claims for refund of the above taxes and interest (R. 33, 37), which claims were rejected by the Commissioner of Internal Revenue (R. 37).

The District Court sustained the Commissioner's determination and dismissed the taxpayer's bill of complaint. (R. 39.) The Circuit Court of Appeals for the Fifth Circuit affirmed. (R. 46.)

ARGUMENT

The Circuit Court of Appeals, affirming the District Court, held, correctly we submit, that the payments in question were taxable income within the meaning of Section 22 (a) of the Internal Revenue Code (Appendix, *infra*). Treasury Regulations 111, Section 29.22 (a)-2 (Appendix, *infra*), provides¹ that, "pensions or retiring allowances * * * are income to the recipients."

¹ These Regulations have remained substantially unchanged since the Revenue Act of 1918. See Treasury Regulations 45, Article 32 (1920 ed.). The basis for petitioner's statement (Br. 12) that for many years the Bureau of Internal Revenue interpreted the revenue law to mean that a pension such as the one here involved is not taxable is not clear. The taxpayer refers not to a ruling of the Bureau but to a letter from the Collector giving his opinion. In I. T. 3329, 1939-2 Cum. Bull. 153, it was ruled that payments to the widow of a corporate officer were not taxable, but in that case there was no contractual obligation. Cf. I. T. 3362, 1940-1 Cum. Bull. 18; I. T. 3653, 1944 Cum. Bull. 75. In the latter two rulings it was held that under Section 22

One exception to this general rule is stated in the following language:

However, so-called pensions awarded by one to whom no services have been rendered are mere gifts or gratuities and are not taxable.

The taxpayer concedes (Br. 7) that "the money with which we are now dealing was paid as a pension." But she contends that because it was paid to her as the widow of a deceased fireman it was a gift or gratuity within the meaning of the above-quoted exception. The Regulations clearly except only those "so-called" pensions which are paid by someone who has received no services. An example of their intended application is retiring allowances made to teachers or their widows by the Carnegie Foundation for the Advancement of Teaching. See L. O. 1040, 3 Cum. Bull. 120 (1920). The Act of the General Assembly of Georgia (Appendix, *infra*), under which the taxpayer received her right to the payments

(b) (2) of the Internal Revenue Code the amounts received each year less three percent of the contributions made by the employee could be excluded from income until the total contributions were recovered. See also, T. D. 3112, 4 Cum. Bull. 76 (1921), relating to payments made to retired federal employees and *Miller v. Commissioner*, 144 F. 2d 287 (C. C. A. 4th). Unless a different result is required because the contributions here were labelled a tax, the payments here would apparently be taxable under that section. But the result would be the same since the tax could not have exceeded \$168 (one percent of \$2,400 for seven years) and that amount was recovered before the tax years here involved.

in question was first enacted in 1924 and is entitled "Pensions for Firemen In Certain Cities; Payments In Case Of Accident, Death, etc." Its first stated purpose is to provide that cities furnish aid, relief and pensions to members and future members of paid fire departments and their dependents in specified cases. Section 4 of the Act (Appendix, *infra*) states:

When such member shall retire as a matter of right he shall be paid one-half of the salary he was receiving at the time of his retirement, for the rest of his life, to be paid monthly. In case of death of a pensioner his widow and children shall draw his pension as herein provided in case of death of member of such department.

In 1925 the Act was amended to provide *inter alia* that "when any fireman who has served twenty-five years and is in active service at the time of his death dies, his widow shall receive the pension he might have taken; during her widowhood." Section 2 (Appendix, *infra*) p. 16.²

Under the decisions of the Supreme Court of the State of Georgia the taxpayer acquired a vested contractual right, upon the death of her husband, to the payments in question. *Trotzier v. McElroy*, 182 Ga. 719; *Hollis v. Jones*, 184 Ga. 273; *West v. Anderson*, 187 Ga. 587; *DeWitt v. Richmond County*, 192 Ga. 770.

² The taxpayer's husband was in the active service of the Atlanta fire department at the time of his death, and had been in that service for more than 25 years. (R. 31.)

It is generally held that payments made to beneficiaries of deceased employees are taxable income to the beneficiary when the payments are enforceable obligations of the payor. *Flarsheim v. United States*, 156 F. 2d 105 (C. C. A. 8th); *Sutro v. United States* (N. D. Calif.), decided June 16, 1942 (1942 P-H, par. 62807; 30 A. F. T. R. 1618). Even if such payments are not regarded as compensation in a technical sense, they are nevertheless income because derived from obligations based on the employer-employee relationship and in no sense constitute gifts within the meaning of Section 22 (b) (3) of the Internal Revenue Code. There is no merit to taxpayer's contention (Br. 11-12) that the board of trustees rather than the City of Atlanta awarded the payments in question. Sections 6, 7 and 13 of the Act of the General Assembly of Georgia (Appendix, *infra*) clearly show that a board of trustees was established merely to administer the funds which the city collected,³ for the purpose of paying pensions in consideration for services rendered the city.

The court below correctly held that the payments received by the taxpayer were not voluntary gifts or gratuities from the City of Atlanta

³ The funds were obtained by the City of Atlanta by levying a tax of one percent on the salaries of firemen in active service and by levying a tax against the premiums of all fire and lightning insurance companies on property situated within the city corporate limits. (Appendix, *infra*, pp. 13-14.)

but were pension payments received under an accrued statutory right. In fact, the legislature had no authority to authorize any gratuities or donations.⁴ This would seem to dispose of any contention that the payments were intended as gratuities. The situation is thus totally different from that in *Bogardus v. Commissioner*, 302 U. S. 34, on which the petitioner relies. There is no conflict of decisions and the fact that the issue has arisen so infrequently in the past suggests that there is no need for further judicial review.

CONCLUSION

The decision is correct and the petition should be denied.

Respectfully submitted,

GEORGE T. WASHINGTON,
Acting Solicitor General.

SEWALL KEY,
Acting Assistant Attorney General.

HELEN R. CARLOSS,
MURIEL S. PAUL,
Special Assistants to the Attorney General.

FEBRUARY, 1947.

⁴ The Constitution of the State of Georgia, Article 7, Section 16 (Georgia Code Annotated, Sec. 2-6401), entitled "Donations forbidden," provides that the General Assembly shall not by vote, resolution or order grant any donation or gratuity, in favor of any person, corporation or association.

APPENDIX

Georgia Laws (1924), pp. 167-173, Act No. 454,
approved August 13, 1924:

PENSIONS FOR FIREMEN IN CERTAIN CITIES; PAYMENTS IN CASE OF ACCIDENT, DEATH, ETC.

No. 454

An Act to provide that cities having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920 or any subsequent census shall furnish aid, relief and pensions to members of paid fire departments now in active service, and whose names are on the pay roll of such department and to future members, and their dependents in specified cases. To provide how such members who have served twenty-five years may be retired for life on half pay. To provide how such members shall be paid in case of total disability resulting from such service, and how such total disability may be determined. To provide for relief in case of sickness or accident resulting from such service. To provide for the relief of dependents and to provide for widows and children of deceased pensioners to be paid in case of death of any such member resulting from said service. To provide that such cities shall levy tax of one (1%) per centum on the salaries of such members in active service and on pay roll and to future mem-

bers to raise in part the funds to pay such aids, reliefs and pensions, collectible monthly. To provide that such cities shall use one-fifth ($\frac{1}{5}$) of the tax collected on fire and lightning insurance companies or associations from the premiums thereof on property situated within the corporate limits of such cities; to pay such aid, relief and pensions. To provide that such cities shall levy a tax of one and one-fourth ($1\frac{1}{4}$) per centum on the premiums of such fire and lightning insurance companies on property situated within the corporate limits of such cities. To provide that one and one-fourth ($1\frac{1}{4}$) per centum shall be the limit which such cities shall be allowed to tax the premiums of such fire and lightning insurance companies or associations on premiums collected on property situated in the corporate limits of such cities. To provide how such funds shall be collected, deposited and managed for the members of such fire departments now in active service and whose names are on the pay roll of such departments and for future members. To create a board of trustees and provide for their selection and election, to manage, deposit, disburse upon order and invest said funds which shall be raised by the one (1) per centum tax on the salaries of members now in active service and future members, and one-fifth ($\frac{1}{5}$) of the premium tax on fire and lightning insurance taxes. To provide that this Act shall not repeal nor in any wise affect any benefit or pension now being paid to those who were receiving the same prior to the passage of this Act;

and that this Act shall not apply to those receiving pensions or benefits prior to the passage of this Act. To provide that such board of trustees shall make all necessary rules for carrying out the terms of this Act. To provide that in case there shall at any time be on hand less funds than are needed, the actual funds shall be prorated among the beneficiaries. To provide that none of the funds mentioned shall be subject to attachment, garnishment, judgment; nor shall they be assignable; but shall be paid in cash to the beneficiary if so requested by him or her. To provide that if any part of this Act shall be held unconstitutional, the remainder of this Act shall remain in force taken in connection with existing laws. To provide that this Act shall not affect nor be affected by any workmen's compensation act or other similar laws. To repeal conflicting laws, and for other purposes.

SECTION 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this Act there shall be raised and established funds for the aid, relief and pension of members of paid fire departments who are in active service at the time of the passage of this Act and whose names are on the pay roll of such departments and future members of such departments, and their dependents in all cities in Georgia having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920 or any subsequent census of the United States.

SEC. 2. Be it further enacted that any member of such fire department who is in active service at the time of the passage of this Act and whose name is on the pay roll, and future members, may as a matter of right, retire from active service, provided he shall have served twenty-five (25) years in active service at the time of his retirement.

SEC. 3. Be it further enacted that any member of such department who is in active service at the time of the passage of this Act and whose name is on the pay roll and future members who shall be injured or whose health shall become permanently impaired to such an extent as to render him totally disabled as a result of such service shall upon application be retired. Should the board of trustees refuse to grant an order of retirement, the applicant shall select a physician, the board shall select a physician, and the two physicians so selected shall select a third. These three shall examine the applicant and determine whether he is totally disabled and the decision of a majority of these physicians shall be final on the question.

SEC. 4. When such member shall retire as a matter of right he shall be paid one-half of the salary he was receiving at the time of his retirement, for the rest of his life, to be paid monthly. In case of death of a pensioner his widow and children shall draw his pension as herein provided in case of death of member of such department.

SEC. 5. When such member shall be retired for total disability he shall be paid one-half of the salary he was receiving at the time of his retirement for the rest of his life, to be paid monthly, but this Act

shall not affect the salary of a member in active service, except the tax or one (1) percent thereon.

SEC. 6. Be it further enacted that there is hereby established, to serve without pay, a board of trustees whose duties it shall be to manage said funds which shall be kept by the City Treasurer of such cities as a separate fund and covered by his bond as such. The board of trustees shall consist of the city treasurer, the city comptroller, the chief of the fire department and two members of the fire department to be elected by the members of said department in active service on the first Monday in September every year after the passage of this Act. These two members of the department to serve one year and until their successors are elected. The city comptroller, city treasurer and chief of the fire department to be permanent members of the board.

SEC. 7. This board shall make all rules for the payment of said funds to those entitled to receive the same. It shall have its first meeting on Wednesday following the first Tuesday in September after the passage of this Act and organize by electing a chairman, a vice-chairman who shall serve when the chairman is absent, and a secretary. The chairman shall sign all vouchers for the disbursements of the fund and his written order shall fully protect the city treasurer in the payment of the same. A majority of the board shall control on all questions.

SEC. 8. The board shall make its own rules as to times and places of meetings.

SEC. 9. A tax of one (1) per centum shall be levied on the salaries of all members in active service at the time of the passage of this

Act monthly; and the city treasurer shall retain that amount from their salaries.

SEC. 10. A tax of one and one-fourth ($1\frac{1}{4}$) per centum shall be levied against the premiums of all fire and lightning insurance companies or associations on property situated within the corporate limits of such cities, and returns by said companies or associations made and tax collected as now provided by ordinance in such cities, to be collected from and after passage of this Act. One-fifth ($\frac{1}{5}$) of the tax provided in this section shall go to aid, relief, and pension funds provided in this Act.

SEC. 11. The city treasurer shall keep separate and apart from other monies in his possession the funds raised in Sections 9 and 10 hereof for the sole uses mentioned in this Act, and subject to the orders of said board of trustees.

SEC. 12. The said city tax on insurance premiums on property situated in the corporate limits of such cities shall be and is hereby limited to one and one-fourth ($1\frac{1}{4}$) per centum.

SEC. 13. The board of trustees shall formulate rules for taking care of members in active service at the time of the passage of this Act while temporarily sick or hurt, and paying the expense thereof. The board of trustees shall formulate rules for paying the pension of a member of the department who loses his life in the service to his widow till she dies or remarries; and for paying to widow and children pension of deceased pensioner; and for paying the pension of such deceased fireman to his orphan children till they reach the age of sixteen; provided the total payments to widow and orphan or orphans shall not

exceed one-half the pay of such deceased fireman. The trustees shall keep a strict account of the disbursements and receipts of all funds which shall be open at all times to public inspection.

SEC. 14. In case a member has served twenty-five year does not desire to retire, and the board of trustees deem such member incapable of further service in the department; the same proceeding shall be had as that to determine the condition of a disabled fireman as set forth in Section three (3) hereof. The decision shall be final.

SEC. 15. The city attorney shall without extra compensation render such legal service as such board of trustees shall require.

SEC. 16. In case there should accumulate more funds than should be needed for immediate use, the board of trustees are empowered to invest such excess funds in United States, Georgia, or municipal bonds; but not otherwise.

SEC. 17. Be it further enacted that none of the funds herein mentioned shall be subject to attachment, garnishment, judgment; nor shall they be assignable; but shall be paid in cash to the beneficiary if so requested by him or her.

SEC. 18. Be it further enacted that if any part of this Act shall be held unconstitutional, the remainder of this Act shall be of full force and effect provided the general terms of this Act can still be carried out.

SEC. 19. Be it further enacted that this Act shall not repeal nor in any wise affect any benefit or pension now being paid to those who were receiving the same prior to the passage of this Act.

SEC. 20. Be it further enacted that the plan and purpose of this Act is to furnish

aid, relief and pension to aged and disabled firemen who are now or may be in the future in the active service of such departments and on the pay roll of such departments and to their dependents. That the taxation herein provided is a part of the general purpose of this Act to accomplish this end.

SEC. 21. Provided this Act shall not affect or be affected by any workman's compensation law, or other similar laws.

SEC. 22. Be it further enacted that all laws and parts of laws in conflict herewith, be and the same are hereby repealed.

Georgia Laws (1925), pp. 194-198, Act No. 159, approved August 7, 1925:¹

FIREMEN'S PENSIONS IN CERTAIN CITIES, ACT OF 1924 AMENDED

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SEC. 2. Be it further enacted, that there be added to said Act a section to be known as Section 14 (a) as follows: Be it further enacted that when any fireman who has served twenty-five years and is in active service at the time of his death dies, his widow shall receive the pension he might have taken; during her widowhood.

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Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.* — "Gross income" includes gains, profits, and income derived from salaries, wages, or compensa-

¹The Act of 1924 was again amended in 1931 (Georgia Laws (1931), p. 223) and in 1935 (Georgia Laws (1935), p. 450), but these amendments do not affect the question in this case.

tion for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly.

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(26 U. S. C. 22.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.22 (a)-2. *Compensation for Personal Services.*—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by the United States (unless expressly exempt) or by private persons are income to the recipients; as are also marriage fees, baptismal offerings, sums paid for saying masses for the dead, and other contributions received by a clergyman, evangelist, or religious worker for services rendered. However, so-called pensions awarded by one

to whom no services have been rendered are mere gifts or gratuities and are not taxable. The salaries of Federal officers and employees are subject to tax. Amounts deducted and withheld pursuant to the Civil Service Retirement Act of May 29, 1930, 46 Stat. 468, 475, as amended (5 U. S. C., 1940 ed., ch. 14), from the basic salary, pay, or compensation of the employees in the civil service of the United States are includible in gross income for the year in which deducted and withheld. As used in this section the term "Federal officers and employees" includes all judges of courts of the United States irrespective of when they took office. Compensation received for services rendered as an officer or employee (including a member of a legislative body and a judge or officer of a court) of a State or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing, is to be included in gross income, regardless of the nature of the office or employment.

The value of services need not be included in gross income when rendered directly and gratuitously to an organization described in section 23 (o). Where, however, pursuant to an agreement or understanding services are rendered to a person for the benefit of an organization described in section 23 (o) and an amount for such services is paid to such organization by the person to whom the services are rendered, the amount so paid constitutes income to the person performing the services even though at the time of the agreement or understanding the person making the payment acknowledges his liability to make payment to such organization. The second sentence of this para-

graph shall not apply where such an agreement or understanding has been entered into prior to May 14, 1942 (the date of the approval of Treasury Decision 5151).

Section 19.22 (a)-2 of Treasury Regulations 103, promulgated under the Internal Revenue Code, as amended by T. D. 5151, 1942-1 Cum. Bull. 34, is substantially the same as the above quoted Section of Treasury Regulations 111.